IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 22525 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
HONOURABLE MR.JUSTICE K.A.PUJ

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

==========

VORA ASSOCIATES & 1 - Petitioner(s)
Versus
UNION OF INDIA & 2 - Respondent(s)

==========

Appearance :
MR DV PARIKH for Petitioner(s) : 1 - 2.
MR YN RAVANI for Respondent(s) :

==========

CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and
HONOURABLE MR.JUSTICE K.A.PUJ

Date : 14/03/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K.A. PUJ)

1. Rule. Mr.Y.N.Ravani, learned Standing Counsel for the respondents waives service of rule.

2. The petitioner has filed this petition under Article-226 of the Constitution of India praying for quashing and setting aside the impugned order No.A/765 to 767/WZB/05/C1 dated 13.7.2005, passed by the Customs Excise & Service Tax Appellate Tribunal (CESTAT).

3. It is the case of the petitioner that the petitioner was engaged in the business of importing old and used ships for breaking at Alang Shipyard, near Bhavnagar. In the regular course of business the petitioner firm had

filed three bills of entry for import of old and used ship in the office of the Superintendent of Customs & Central Excise, S.B.Y., Alang. It is also the case of the petitioner that although the petitioner firm had furnished all the requisite documents for assessment of import duties, the Assistant Commissioner, Bhavnagar, had assessed them provisionally solely on the ground that fuel, lubricating oils and other provisional stores remaining on Board the ship brought for breaking to Alang Shipard at the end of its voyage should be assessed to duty separately under the respective heads instead of assessing the old and used ship as a whole.

4. The Assistant Commissioner of Customs, Bhavnagar, on final assessment of the Bill of Entry called upon the petitioner firm to pay differential duty of Rs.3,04,739/- in respect

of fuel oil, food stuff and provisions which remained on the aforesaid ship on its voyage to Alang. During the final assessment there was no calculation sheet enclosed with the final assessment orders. The petitioner thereafter being aggrieved by the said order filed appeal before the Commissioner (Appeals) Ahmedabad. The said appeal was disposed of with the direction to the Assistant Commissioner of Central Excise to give an opportunity to the appellant to represent its case, especially when the declaration given by the appellant as regards the quantity and value was not acceptable to him and he had some other evidences to convince himself that this declaration was not true. These evidences were required to be given to the appellant for rebuttal and after taking into consideration the defence to be made by the appellant, the demand should have been confirmed. Instead of

supplying the said documents and evidences and basis with regard to quantity and valuation, the learned Deputy Commissioner, Customs, Bhavnagar passed an order dated 11.10.2001 holding that the remaining fuel and oil including other ships stores drinks and food stuff should be classified separately in their own appropriate heading and confirmed the final assessment.

5. Being aggrieved by the said orders the appeals were preferred alongwith stay applications. The Commissioner of Customs (Appeals) vide stay orders No.177 to 179 of 2003 dated 13.11.2003 has issued directions to pre-deposit the amounts of Rs.9,58,069/-, Rs.3,04,739/- and Rs.3,34,651/- of differential duty by 29.11.2003. The appellant did not deposit the amounts as directed and filed a Misc. Application on 28.11.2003 requesting for

modification of the stay order. Despite several opportunities, the appellant did not appear and hence Commissioner vide his order dated 22.3.2004 dismissed appeals both on the ground of non-compliance as well as on merits, after having relied on the decision of the Tribunal in the matter of Ghaziabad Ship Breakers and Anr. Vs. Commissioner of Customs (Prev.) Ahmedabad, reported in 2002 (142) ELT 143.

6. Being aggrieved by the said order the petitioner preferred appeal in the CESTAT alongwith the stay application for waiver of pre-deposit of duty as well as stay against recovery thereof. The CESTAT vide its order dated 23.7.2004 directed the petitioner to deposit the entire amount. The petitioner thereafter moved modification application and the said application was rejected by the CESTAT

on 3.1.2005. Being aggrieved by the said order of the CESTAT the petitioner filed Special Civil Application No.5915 of 2004. While deciding the said writ petition, this Court has observed in the order dated 4.4.2005 that the grievance was raised by the petitioner with regard to quantity and valuation on the basis of which the demand has been worked out. The Court has directed the petitioner to make necessary application before the CESTAT. The petitioner applied for certified copy of the order on 5.4.2005. The matter was placed for hearing on 16.5.2005 before the CESTAT. On that day the submission was made on behalf of the petitioner before the CESTAT that this Court has already decided the matter on 4.4.2005 directing the petitioner to move necessary application. However, certified copy was not received hence necessary application could not be moved. The Tribunal has dismissed the

petitioner's appeal vide order dated 13.7.2005 on the ground that the order regarding pre-deposit was not complied with by the petitioner.

7. Being aggrieved by the said order, the present petition is filed before this Court challenging the order of pre-deposit as well as the dismissal of the petitioner's appeal by the CESTAT.

8. Mr.D.V.Parikh, learned advocate appearing for the petitioner has submitted that the issue involved in the present petition is only with regard to direction given by the Commissioner (Appeals) to the Assistant Commissioner to comply with the directions to supply the details of quantity and valuation. The said directions have not been complied with and straight-way the order was passed confirming

the demand. He has further submitted that in number of other matters similar directions were issued and without complying with those directions, fresh orders were passed. In appeals being filed challenging the said orders, only 10% of the duty amount was ordered to be deposited and stay was granted. He has further submitted that even in the similar circumstances, one of the parties, namely, Shreeji Traders has raised this issue before this Court in Special Civil Application No.6299 of 2002 before this Court. While disposing of the said petition on 13.8.2002, this Court has quashed and set aside the order passed by the Dy. Commissioner and directed him to hear the matter afresh after giving the petitioners copies of the documents as referred to in the order dated 21.10.1999 of the Commissioner (Appeals) within one month from the date of receipt of the said order. One of us

(K.A.Puj,J.) is a party to the said decision and it is reported in 2003 (160) ELT 67 (Guj.).

9. Considering the aforesaid decisions, Mr.Parikh has submitted that both the impugned orders are required to be quashed and set aside and the CESTAT be directed to decide the appeal of the petitioner on merit after waiving the pre-deposit of duty and granting stay against the recovery of the amount.

10. Mr.Y.N.Ravani, learned Standing Counsel appearing for the respondent has submitted that the petitioner has been given adequate opportunities by the Assistant Commissioner as well as Commissioner and still the same have not been availed of by the petitioner and hence order regarding pre-deposit of the entire amount and on its non-compliance the order of dismissal was passed by the CESTAT. He has

further submitted that this issue is squarely covered by the decision in the case of Ghaziabad Ship Breakers and Anr. V/s. Commissioner of Customs 2003(151) ELT 636, wherein the duty imposed on the petitioner was confirmed by the Tribunal. Tax Appeal has been filed, in which no stay has been granted by this Court. He has further submitted that the order regarding pre-deposit is the discretionary order and this Court should not interfere while exercising its power under Article-226 of the Constitution of India.

11. After having heard learned advocates appearing for the respective parties and after having gone through the various orders passed by the authorities as well as other decisions relied upon before the Court, we are of the view that the grievance of the petitioner could not be redressed with regard to supply of

necessary documents and since in other cases order regarding pre-deposit was passed by the CESTAT directing the party to deposit 10% of the amount, petitioner should also be given the same treatment.

12. In the above view of the matter, we are of the view that both the impugned orders are required to be quashed and set aside on condition that the petitioner shall deposit an amount of Rs.1,57,745/- being 10% of the total duty amount within two weeks before the Dy. Commissioner of Custom, Bhavnagar and on production of the challan before the CESTAT with regard to said deposit, the CESTAT will consider the petitioner's application for pre-deposit and if in other similar cases, the order of pre-deposit of 10% has been passed by the CESTAT the said orders be considered while deciding the stay applications of the

petitioners and the appeals may be decided on merit.

13. Subject to the aforesaid directions and observations this petition is allowed to the aforesaid extent. Rule is made absolute without any order as to costs.

(ANIL. R. DAVE, J.) (K. A. PUJ, J.)

kks